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**In the Supreme Court of the
State of Utah**

FILED

MAY 10 1963

LOUISE B. TAYLOR, et al,
Appellant,
vs.
VIRGINIA CLARE JOHNSON,
Respondent.

Clerk, Supreme Court, Utah

**DOCKET
NO. 9874**

APPELLANT'S BRIEF

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In the Supreme Court of the State of Utah

LOUISE B. TAYLOR, et al,

Appellant,

vs.

VIRGINIA CLARE JOHNSON,

Respondent.

**DOCKET
NO. 9874**

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff, for herself and as guardian of her minor children, for damages for the wrongful death of her husband and father of the children, who was killed while in the process of removing a disabled motor vehicle and trailer from the highway when defendant drove a motor vehicle against the trailer.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From the verdict and judgment for defendant and from the denial by the Court of plaintiff's Motion for Judgment N.O.V. and/or a new trial plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment entered, and judgment as to liability in her favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

At about 9:30 p. m. on the evening of June 13, 1961, Don R. Milner, with his wife and daughter, was driving North on Highway U-28 between Gunnison and Levan, Utah (Tr. 6, 7). Milner was driving a 1952 Chevrolet car and was pulling a two-wheel single axle trailer that he had made, (Tr. 9), when he struck a deer on the Highway and broke the rear axle on his car. After the impact with the deer, the Milner car and trailer came to rest, facing North, within a few feet of the white line marking the East edge of the Highway and about parallel with that line (Tr. 9).

The accident occurred near the bottom of a general dip, which is approximately one mile wide (Tr. 131). A car approaching from the South would be on a slight downgrade and would have clear and unobstructed view for one-half mile (Tr. 131). The road is straight and was in good condition on the night of the accident (Tr. 131). The highway had been recently resurfaced with asphalt and was 37 feet wide (Tr. 132). The East half of the roadway (Northbound) was 19 feet 2 inches wide and the West half (Southbound) is 17 feet 10 inches wide (Tr. 138). The speed limit at night was 50 miles per hour (Tr. 131). The investigating officer could not place the Milner vehicles by exact measurement, where they first came to rest, because they removed the Milner car and the wrecker before they made any measurements (Tr. 133).

After hitting the deer, Mr. Milner, with his flashlight, flagged down a car approaching from the South and the car stopped some distance South of the Milner vehicle (Tr. 10). That automobile was driven by Everett Kester and he was accompanied by his wife, his wife's sister, and four children (Tr. 47). Mr. Kester then pulled his car to the left around the Milner vehicle and stopped some distance to the North of the Milner vehicle, off the East shoulder of the road (Tr. 49 and Ex. 4). Kester and Milner were acquaintances and Mr. Kester examined Milner's car and they both decided that the only way to move it would be to get a wrecker (Tr. 50).

At that time another vehicle was approaching from the South and Milner flagged it down and asked the occupants to send out a wrecker, which they agreed to do (Tr. 50). About one-half hour later (Tr. 50), the wrecker, driven by James Warner Taylor, plaintiff's decedent, came out from Levan and pulled off the road on the West side of the highway a short distance to the South of the Milner vehicle (Tr. 12, 51). The wrecker operator got out of his wrecker, looked the situation over, and they all agreed that the Milner car would have to be lifted and towed from its rear (Tr. 13). Milner asked Kester if he would pull the trailer in and Kester agreed to do so (Tr. 52). Milner unhitched the trailer and they moved the trailer to the shoulder on the East side of the road (Tr. 13). Its actual position on the side of the road was illustrated by the various witnesses as T. 2 on Exhibits 3, 4, and 5. After the trailer had been moved, Milner removed the trailer hitch from his car, (Tr. 14), and the wrecker operator moved the wrecker into position to pick up the Milner car (Tr. 13). While the wrecker operator was attaching the Mil-

ner vehicle to the wrecker, Milner and Kester were placing the trailer hitch on the Kester car, which had been backed up to a position in front of the trailer (Tr. 14, 15).

Milner and Kester could not tighten the trailer hitch on Kester's car because they did not have the right kind of wrench. As the wrecker operator completed hoisting the Milner car, Milner asked him to bring a socket wrench to tighten the trailer hitch bolts (Tr. 16). The deceased, on the West side of the tongue of the trailer, was leaning over tightening the trailer hitch (Tr. 16, 17), when the collision which took his life occurred (Tr. 53). Plaintiff's decedent had been so engaged for "a couple of minutes" (Tr. 24).

At the time of the collision the wrecker was standing on the East half of the roadway, facing South and the rear end of the Milner car was attached to the wrecker lift and was hoisted off the ground (Tr. 6). The wrecker lights were on low beam, an amber light on each front fender of the wrecker was flashing yellow; and a large blue light on top of the cab of the wrecker was oscillating. In addition, there were a number of other lights on the wrecker, including a flood light that was shining on the Milner car (Tr. 17, 37, 129). The lights on the Milner car were on, the lights on the Kester car were on and there were four flashlights on the scene, all of which were burning (Tr. 17). The Milner trailer had two red reflectors mounted one on each side of the tailgate. These reflectors were 3 to 4 inches in diameter (Tr. 10, 56).

After the wrecker arrived at the scene and while it was in place on the East half of the roadway lifting the Milner car, a number of other vehicles approached from the

South, all of which would slow down and pass on the West half of the roadway (Tr. 19, 57, 85).

Defendant, driving a 1959 Pontiac, was traveling North (Tr. 187). As she approached the scene of the accident there was nothing that obscured her view of the highway (Tr. 188). She could see ahead of her for one-half mile (Tr. 196). At a point one-half mile North of the place of the accident (Tr. 196), she saw the lights, including the blue revolving light and recognized it as a wrecker (Tr. 188). When she first saw the wrecker she wondered if there was an accident on the road (Tr. 189). As defendant approached the scene of the accident there were no other cars coming behind her or from the North (Tr. 196). According to the defendant she was traveling "just right around 60" (Tr. 194). When she got fairly close to the wrecker, it "dawned" on her that the wrecker was over the white line on her side of the road (Tr. 189). She did nothing with respect to braking or slowing down her car until she got to a point right in front of the wrecker, where she either had to "hit the wrecker or go around it to the right", and at that time all she did was take her foot off the gas (Tr. 198). Part of defendant's testimony on cross-examination was as follows: (Tr. 198)

"Q. All right, Miss Johnson, lets see if I understand your testimony. At a time when you were approximately a half-mile South of where the impact occurred, you could see a vehicle ahead of you with head lights and with a blue light which you at that point recognized to be a wrecker?

A. That's right.

Q. You did nothing with respect to braking or slowing down your car until you got to a point right

in front of it where you either had to hit it or go around it to the right, is that correct?

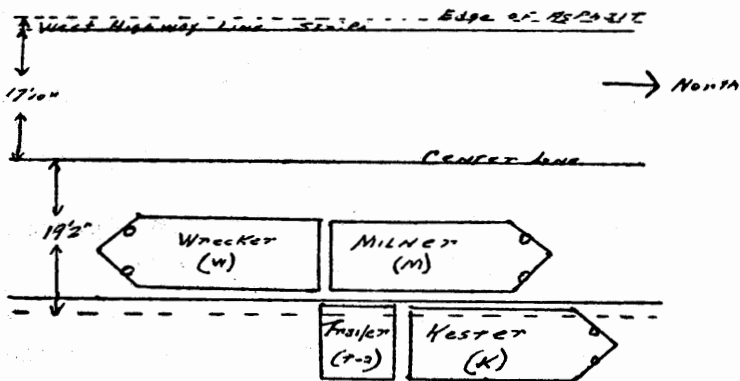
A. That's correct.

Q. And at that time all you did was to take your foot off the gas?

A. That's right."

The defendant struck the trailer pushing it into the Kester automobile and the impact pushed both of those vehicles forward 76 feet 4 inches (Tr. 134). Plaintiff's decedent, James Warner Taylor, was killed by this impact. Witness, Mrs. Kester, first observed the headlights of the defendant's car when it was about seven-tenths of a mile away (Tr. 87). The car was constantly in her view (Tr. 91), and she estimated defendant's speed as between 70 and 80 miles per hour (Tr. 93).

The following diagram, appellants think, fairly depicts the respective vehicles on the roadway at the time of the collision.



At the conclusion of the evidence plaintiff moved the Court for a directed verdict for the plaintiff, submitting

to the jury only the question of damages. The Court took the motion under advisement (Tr. 206). After the jury returned, plaintiff moved the Court for judgment notwithstanding the verdict, which the Court also took under advisement (Tr. 235). Thereafter plaintiff filed written motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (R. 11). All of these motions were denied by the Court (R. 27).

POINTS URGED FOR REVERSAL

1. The evidence shows, as a matter of law, that defendant was negligent and that her negligence was an intervening, independent sole proximate cause of the accident.
2. That the plaintiff's decedent was not guilty of any contributory negligence. That even if he was, such negligence was not a proximate cause of the accident.
3. The Court erred in instructions given to the jury.

ARGUMENT

POINT I

THE DEFENDANT WAS NEGLIGENT AS A MATTER OF LAW AND HER NEGLIGENCE IS AN INDEPENDENT, INTERVENING, SOLE PROXIMATE CAUSE OF THE ACCIDENT IN QUESTION.

Plaintiff's decedent, James Warner Taylor, was on a rescue mission. The Milner car and trailer were immobile and the car could only be towed by lifting it from the rear. The wrecker was in position to hoist that vehicle. The wrecker headlights were on low beam; a flashing yellow

light was mounted on each of its front fenders and a large blue light atop its cab was oscillating. The headlights on the Milner car were on. The headlights on the Kester car were on. A floodlight on the hoisting portion of the wrecker was on. In addition thereto, there were at least four flashlights at the scene. Defendant, traveling North, observed the lights ahead of her at a time when she was one-half mile away and, at that time, recognized that one of the vehicles was a wrecker. She thought there might be an accident up ahead but, nevertheless, continued traveling, by her own admission, at a speed of 60 miles per hour and did nothing whatsoever by way of slowing her vehicle to bring it under control so as to be able to avoid the collision. When she got so close to the vehicles upon the roadway that she had to "hit the wrecker head-on, or turn to the right", she merely took her foot off the gas and turned right.

The negligence of the defendant in traveling at a speed greater than the speed limit and in failing to slow down her car or to bring the same under control after she observed the warning lights on the vehicles on the roadway one-half mile in front of her, renders her guilty of negligence as a matter of law, and her later negligence is an independent, intervening, sole proximate cause of the accident in question. *Hillyard vs. Utah By-Products*, Utah 2nd 143, 263 Pacific 2nd 287; *McMurdie vs. Underwood*, 9 Utah 2nd 400, 346 Pacific 2nd 711; *Velasquez vs. Greyhound Lines, Inc.*, 12 Utah 2nd 379, 366 Pacific 2nd 989.

POINT II

PLAINTIFF'S DECEDENT WAS NOT GUILTY OF ANY CONTRIBUTORY NEGLIGENCE, HOWEVER,

EVEN IF HE HAD BEEN NEGLIGENT, SUCH NEGLIGENCE WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.

The plaintiff's decedent was removing the vehicles from the road and shoulder thereof. His wrecker was well equipped with numerous warning devices, all of which were on and functioning, and which gave warning in all directions for a great distance. When he arrived at the scene, the wrecker operator determined that the Milner car would have to be hoisted from its rear and that he could not tow both of the immobile vehicles, that is, both the automobile and the trailer. Mr. Kester offered to pull the trailer in. Mr. Milner and Mr. Kester removed the trailer hitch from the Milner car and were in the process of placing the same on the Kester car so that the trailer could be affixed to it. As the decedent finished hoisting the Milner car he was asked by Mr. Milner if he (decedent) had a socket wrench that would tighten the trailer hitch. He secured a wrench from his wrecker and moved to a position between the Kester automobile and the trailer for the purpose of tightening the bolt. While so engaged it was necessary that he devote some time to that which he was doing and it was not reasonable to expect that he could have been as vigilant about his own safety as other people who happened to be on or about a road and are not so occupied. Reid vs. Owen (Utah) 93 Pacific 2nd 680.

Inasmuch as the defendant admitted that she saw the vehicle at a time when she was one-half mile away, and, by its warning devices, recognized it to be a wrecker, it seems extremely unlikely that any failure to place flares would be of any consequence. As pointed out by the Court

in *Velasquez vs. Greyhound Lines*, *supra*, "If there had been flares out, or even if the truck had been aflame, it could have given (her) no more information".

After the wrecker had pulled into position to hoist the Milner car and previous to the arrival on the scene by the defendant herein, a number of vehicles had approached from the South. All of those drivers were able to bring their car under control and could and did approach cautiously and pass on around on the West half of the highway without any difficulty whatever (Tr. 19, 57, 85).

Defendant argues that the plaintiff's decedent, after attaching the Milner automobile to the wrecker, had time to remove those vehicles off the main traveled portion of the highway and that his failure to do so was negligence which contributed to the accident in question. That position ignores the fact that there were two vehicles to be removed, the automobile and the trailer. Further, it loses sight of the fact that the trailer was not connected to the Kester car and was therefore not lighted. To require the decedent or Milner or Kester to work hitching the trailer without the protection of the wrecker warning lights, would, in essence, be saying that it is more dangerous to leave a warning light on the road than it was to leave an unlighted vehicle. *Hirschback vs. Dubuque Packing Company* 7 Utah 2nd 7, 216 Pacific (2) 319.

As pointed out by the Court in *Velasquez vs. Greyhound Lines, Inc.*, *supra*, the problem of controlling importance on this appeal is: Was the negligence of the defendant in failing to slow down or to bring her car under control after she saw the wrecker, the sole proximate cause of the plaintiff's decedent's death, or was the prior parking of the wrecker on the highway, partially obstructing the

Northbound traffic lane, also a concurring proximate cause thereof. The claimed contributory negligence on the part of plaintiff's decedent was, one; his alleged failure to place flares upon the highway and, two; the interval of time which amounted to approximately three (3) minutes which was used by him, after he hoisted the Milner vehicle with the wrecker, to tighten the trailer hitch on the Kester car. As far as the flares are concerned the defendant admitted having seen the warning lights and to have recognized that it was a wrecker, at a time when she was one-half mile away. By seeing and recognizing that light and by seeing the other lights which she could have seen had she been observant, she had all of the warning that any possible signals could have given her. The second contention, that is, that the time utilized by decedent, a three minute interval, used to tighten the trailer hitch, was a proximate cause of the accident, is simply saying that if the vehicles had not been on the road an accident would not have happened.

POINT III

THE COURT ERRED IN INSTRUCTIONS GIVEN TO THE JURY.

The instructions given by the Court to the jury, about 46 in number, are in some instances contradictory and in other respects serve to over-emphasize particular aspects of the case; to permit the jury to speculate; are indefinite; and, were prejudicial to the plaintiff.

Appellant's position is that the defendant was guilty of negligence as a matter of law. Also, that the negligence of the defendant in failing to bring her car under control or stop after she saw the warning lights and recognized

that the vehicle was a wrecker, at a time when she was approximately one-half mile away from the scene of the accident, and had ample time to do so, was an independent, intervening sole proximate cause of the accident. Appellant took the position that the only question which should have been submitted to the jury was the question of damages. A Motion for Directed Verdict for the plaintiff, submitting the question of damages to the jury, was made by the plaintiff at the conclusion of the trial (Tr. 206). Upon denial of that motion by the Court, and after an indication from the Court that he intended to submit the case to the jury in all of its ramifications, and, after the Court had instructed the jury, the plaintiff excepted to the following instructions which the Court failed to give and to the following instructions which the plaintiff claims were erroneously given by the Court.

A. By its requested instruction No. 3, the plaintiff ask for an instruction in the nature of the last clear chance. This instruction was premised upon the admission by the defendant that she saw the lights of the wrecker at a time when she was approximately one-half mile away and that at that time she thought there might be an accident on the road, however, that she continued toward the wrecker at a great and excessive speed, without slowing her car by application of brakes or otherwise, until she was a few feet from the wrecker. She also admitted that it "dawned" on her that she had to hit the wrecker or turn to the right and, that she could not see ahead of the lights that were on the wrecker, but, that even so, it was her intention to go around that vehicle. The plaintiff reasoned that she therefore had the last clear chance to avoid the accident and in these circumstances any act of negli-

gence on the part of plaintiff's decedent, that is on the part of James Warner Taylor, would not bar recovery by the plaintiff. This request was supported by the cases of *Barnett vs. U. S.* (1948) 78 Fed. Supp. 186 and by *Fox vs Taylor* (Utah) 10 Utah 2nd 174.

B. Plaintiff excepted to instructions Nos. 19, 20, 21, and 22 as given by the Court.

This series of instructions deals with the problems of blinding lights, reaction time, anticipation of danger, and sudden and unexpected peril. In other words, in substance and effect, with emergency situations. Although these matters were claimed by the defendant as part of her theory of the case, there is no evidence whatever in the record to support any such instruction. The defendant saw the warning lights of the wrecker and thought there might be an automobile accident up the road at a time when she was one-half mile away. She proceeded on at an excessive speed without in any manner slowing her car or attempting to bring it under control until she had reached a point where, according to her, she either had to hit the wrecker head-on or turn to the right. If the defendant was confronted with any emergency in this case, it was an emergency of her own choosing or of her own making, and was not an emergency created by the action of anyone else. In that event, she would not be entitled to any such instruction.

Instruction No. 19, deals with the "blinding" by the headlights of oncoming vehicles and the obscuring of objects behind it by reason thereof. The only moving vehicle here was the vehicle driven and propelled by the defendant. There is no evidence whatever that there was any sudden bright lights or any other blinding lights. This

instruction finds absolutely no factual support in the record, is contrary to the evidence, and is prejudicial to the plaintiff.

Instruction No. 20, deals with the problem of reacting instantaneously upon seeing danger and with reaction time. Here again, the instruction finds no support from a factual basis on any testimony in the transcript of evidence. The warning lights on the wrecker were clearly visible to the defendant for a long distance and she did in fact see the warning lights at a time when she was one-half mile removed from the scene of the accident. She saw the danger timely, but she failed and neglected to slow her car or to bring the same under control so that she would be able to meet the situation on the roadway ahead of her. She was not entitled to the instruction and the instruction was prejudicial to the plaintiff.

By instruction No. 21, the jury was told that the defendant was not required to anticipate or guard against anything which could not reasonably be expected. The jury were further told that if the defendant could not, in the exercise of ordinary care, have avoided the collision, then the plaintiff could not recover. This instruction is clearly erroneous and is not supported by any facts whatever in the transcript. After she had admitted seeing the warning signals, timely, the effect of this instruction could only be to lead the jury to believe that it was required that she see the exact nature of the danger up the road. In the circumstances of this case such instruction is erroneous and prejudicial to the plaintiff

Instruction No. 22 deals with sudden and unexpected peril. Had the defendant turned around a corner or come over the crest of a hill and been suddenly confronted with

a situation which, at her then speed, she could not stop her automobile, the above instruction may have been proper. In this instance the defendant saw the situation on the roadway ahead of her, at a time when she was one-half mile away, and heedlessly continued on at a great and excessive speed without materially slowing or bringing her car under control until it was too late so to do. This instruction is not supported by any evidence in the transcript, is contrary to the evidence in the record, and is prejudicial to the plaintiff and permits the jury to speculate.

C. Plaintiff excepted to instructions Nos. 30, 33, and 34 as given by the Court.

These three instructions, in substance and effect, deal with the duty to warn and to place flares or other warning devices upon the roadway. The record is clear and uncontroverted that the wrecker was equipped with a blue oscillating light on the top of its cab, with amber flashing lights on each of its front fenders, a floodlight on the hoister, and other lights mounted about the body of the wrecker, all of which were in operation and burning as the defendant approached the scene. In addition the lights on the Milner car were burning, the lights on the Kester car were burning, and there were four flashlights, all burning, about the scene. The transcript is also clear that the defendant observed the warning signals; that she thought there might be an accident up the road, but that nevertheless, she continued on at an excessive speed without even slowing her car or bringing the same under control so that she could stop if necessary to avoid a collision.

Instruction No. 30, among other things, tells the jury that if there were no flares or other warning signals placed on the highway to warn motorists approaching from the

South, then the jury could find James W. Taylor was negligent and the plaintiff could not recover if such lack of reasonable care was a proximate cause of the collision. This instruction was not supported by any evidence whatever in the transcript. The record is clear that the defendant saw the warning signal. The warning lights which the defendant saw should have warned her that there was an object in front which would have to be avoided and she should have driven in such a manner and at such a rate of speed that she could have avoided a collision at any time, *Hirschbach vs. Dubuque Packing Company, supra*. Moreover, the instruction does not say whose duty it was to place additional flares or where such additional flares should have been placed, and leaves the matter to the speculation of the jury. In addition thereto, the instruction conflicts with another instruction given by the Court, No. 25, which, in part, tells the jury that they could not find decedent negligent merely because of failing to place the flares on the road if the wrecker was equipped with warning lights on its top and was then being used to remove a stalled vehicle from the highway. The instruction as given by the Court in No. 30, was improper; was not a correct statement of the law; is not supported by any factual evidence, and was prejudicial to the plaintiff.

By instruction No. 33, the jury were again told that the failure to warn approaching traffic of the obstruction by lights, flags, guards or other practical means, may constitute negligence on the part of the wrecker operator. This instruction does not even require that such negligence, if any, be a proximate cause of the collision. What we have said above with respect to instruction No. 30, is, we think, equally applicable to instruction No. 33.

By instruction No. 34, the jury were told that if they found that the decedent did not use ordinary care and diligence to warn oncoming motorists of the obstruction, then they should return a verdict for the defendant and against the plaintiff, no cause of action. Like instruction No. 30 and 33 hereinabove mentioned, this instruction is erroneous and prejudicial to the plaintiff, because defendant admitted seeing the warning signals.

The cumulative effect of the four instructions hereinabove mentioned dealing, in substance and effect, with sudden emergency, and the three instructions hereinabove mentioned dealing with the failure to warn or to place flares, is to greatly over-emphasize those aspects of the case. They permit the jury to speculate, in some instances they are in conflict with other instructions given by the Court and their effect is highly prejudicial to the plaintiff.

CONCLUSION

The Trial Court erred in refusing to direct a verdict for the plaintiff, leaving to the jury only the question of damages; in refusing to grant plaintiff judgment notwithstanding the verdict, and the Court erred in its instructions to the jury.

The Supreme Court should reverse and should direct the Trial Court to submit only the question of damages on a new trial, unless the Court itself can fix the plaintiff's damages from the undisputed evidence offered.

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